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In the Supreme Court
OF THE
United States

OCTOBER TERM 1972

NO.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Petitioner,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion (Appendix B) and Judgment (Appendix C) of the United States Court of Appeals

for the Ninth Circuit entered on December 15, 1972, rehearing having been denied on March 12, 1973 (Appendix D).

Opinion Below

The Findings of Fact and Conclusions of Law of the District Court is set forth herein in Appendix A. The opinion of the Court of Appeals (Appendix B) reversing the judgment of the District Court is reported at 470 F.2d 1133 (1972).

Jurisdiction

The judgment of the Court of Appeals (Appendix C) was dated and entered December 15, 1972. Timely Petition for Rehearing was filed, and subsequently denied on March 12, 1973 (Appendix D). This Court has jurisdiction under 28 U.S.C. §1254 (1).

Questions Presented for Review

1. If, in the trial of an action without a jury, a District Court does not apply state rules of contract interpretation and also excludes evidence offered by an insurer which would be material and admissible in aid of insurance contract interpretation under state rules of evidence if the insurance contract is ambiguous, but, nevertheless, enters judgment in favor of the insurer on other grounds, may a Court of Appeals which reverses the District Court judgment, because it considers the insurance contract ambiguous, direct entry of judgment against the insurer without re-

manding to the District Court for futher proceedings in which the state rules of contract interpretation are applied and the excluded evidence admitted and considered?

2. Whether a Court of Appeals may reverse a District Court judgment and direct entry of judgment for the appellant, when the Court of Appeals concedes that a contention advanced by the appellee has possible merit as grounds for affirming the District Court judgment which was entered on other grounds, by assuming that the District Court determined that no issue existed on such contention?

Statutes Involved

§13-701, Revised Codes of Montana:

"UNIFORMITY OF INTERPRETATION. All contracts, whether public or private, are to be interpreted by the same rules, exept as otherwise provided by this code." (Volume 2, p.68)

§13-709, Revised Codes of Montana:

"INTERPRETATION IN FAVOR OF CONTRACT. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done, without violating the intention of the parties." (Volume 2, p. 77)

§ 13-710. Revised Codes of Montana:

"WORDS TO BE UNDERSTOOD IN USUAL SENSE. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaing, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in

which case the latter must be followed." (Volume 2, p.78)

§ 13-711, Revised Codes of Montana:
"TECHNICAL WORDS. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." (Volume 2, p. 79)

§ 13-713, Revised Codes of Montana:
"CONTRACTS EXPLAINED BY CIRCUMSTANCES. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." (Volume 2, p. 80)

§ 13-720, Revised Codes of Montana:
"WORDS TO BE TAKEN MOST STRONGLY AGAINST WHOM. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party." (Volume 2, p. 84)

§ 93-401-17, Revised Codes of Montana:
"THE CIRCUMSTANCES TO BE CONSIDERED. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." (Volume 7, p. 711)

§ 93-401-18,Revised Codes of Montana:
"TERMS TO BE CONSTRUED IN THEIR GENERAL ACCEPTATION. The terms of a

writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly." (Volume 7, p. 712)

Statement of Case

The questions presented for review raise serious issues of general import which go to the very heart of appellate review and procedure. While the issues themselves relate to appellate procedure, it is necessary to give a somewhat detailed statement of the District Court proceedings to place the issues in context.

Respondents Link purchased an architect's errors and omissions policy from Continental Casualty Company (herein referred to as "Continental") for the period November 11, 1965, to November 11, 1966. Under the terms of the policy, the insurance afforded applied to "errors, omissions or negligent acts which occur ... during (the) policy period if claim therefor is first made against the insured during (the) policy period." (This clause is herein referred to as the "If Claim" clause.) A condition of the policy required cooperation and compliance by the insured with the terms of the policy for any action to lie against Continental.

Links were architects of a building constructed by Respondents Wayrynen with J. G. Link performing the architectural services thereon, both before and

after November 11, 1966, the date on which the Links' policy with Continental terminated by lapse. At a meeting in May, 1967, a squeaking floor problem was discussed with J. G. Link by the Wayrynens and he was questioned about the possibility of architectural error. Wayrynens acknowledged that it was not until after the Links' insurance policy lapsed that they thought anything was seriously wrong with the floor, and that they made no assertion against the Links during the policy period of any error, omission or negligent act. The squeaking floor problem not being resolved, the Wayrynens filed suit in state court in June, 1967, against the Links and others seeking damages. Shortly thereafter, the Complaint was sent to Continental for defense, which was the first Continental knew about the problem.

The Links did not give Continental any information concerning the claim until October 6, 1967, at which time J. G. Link told Continental's adjuster and claims manager that the first he knew of any squeaks in the building was when he was requested to attend the meeting with the Wayrynens in May, 1967. In reliance of this information, Continental disclaimed coverage on the basis that no claim had been made against the Links for error, omission or negligent act within the policy period.

The Links defended the state court action and filed a Third Party Complaint against Continental seeking to hold it liable under its policy for any judgment obtained by the Wayrynens against the Links. Contin-

ental removed the action to District Court, whereupon the orginal action of the Wayrynens against the Links was remanded to state court. The third party action, however, was retained in District Court. The state action was tried, and, after obtaining judgment for $73,342.00 against the Links and others, the Wayrynens filed suit against Continental in the District Court in which Links' action against Continental was pending and the two actions were then consolidated. There being diversity of citizenship, and the jurisdictional amount being exceeded in both actions, federal jurisdiction existed under 28 U.S.C. § 1332.

Continental alleged defenses of no coverage to the Links under its policy because no claim had been made against the Links for error, omission or negligent act within the policy period (herein referred to as "If Claim" defense), late notice, estoppel and laches. At trial, Continental sought to introduce extrinsic evidence of surrounding circumstances of the issuance of the policy insofar as such circumstances related to public policy, intent of the parties, and the overall coverage question, but the District Court refused to admit, hear or consider such evidence.

During trial, Mr. Link testified that he knew and had been advised by Mrs. Wayrynen of the squeaks during the policy period. Because of this testimony and other evidence introduced by the Respondents, or by Petitioner without objection, Continental contended that there was no coverage because of breach of the cooperation condition of the policy. The Dis-

trict specifically found

> "When the Links on October 6, 1967, advised Continental that the first time any squeaks in the funeral home were known by the Links was in May, 1967, the Links were duty bound to give Continental a fair, frank and substantially full disclosure of information: if the Links did know of squeaks in the funeral home in September or October, 1966, as they now say they did, and as the court so finds, then a fair, frank and substantially full disclosure of material information was not given to Continental on October 6, 1967." (Pages A-25 and A-26, Appendix A)

Based thereon, the District Court **concluded** that the Links breached the cooperation condition of the policy and entered judgment in favor of Continental on that ground, as well as the grounds of late notice, estoppel and laches. The **conclusion** that the Links breached the cooperation condition was stricken by the District Court on post-judgment motion of the Wayrynens because, the District Court said, the issue of coverage was primarily controlled by the Links' failure to give Continental timely notice and that the Court had ruled during trial that the cooperation of the Links was not an issue. The above finding that the Links did not give a "fair, frank and substantially full disclosure of material information," however, was not stricken and remains as a District Court finding. No determination was made by the District Court as to whether Mrs. Wayrynen advising Mr. Link during the policy period of the squeaks constituted a claim for error, omission or negligent act.

On appeal by the Respondents, in addition to the

grounds given by the District Court for its judgment favoring Continental, Continental sought affirmation on the grounds of (a) the "If Claim" defense and (b) breach by Links of the cooperation condition of the policy. The Court of Appeals, nevertheless, reversed and directed entry of judgment for the Links and the Wayrynens.

Notwithstanding acknowledgment on the part of the Links and Wayrynens by brief to the Court of Appeals that

> "the only thing which the policy requires is that a 'claim' which arises because of an error, omission or negligent act, be made against the insured during the policy period,"

the Court of Appeals held that it was unclear whether the policy afforded coverage only if claims were made for error, etc., against the architect during the policy period (a "discovery" type policy), or if coverage was afforded thereunder for errors, omissions or negligent acts which occurred during the term of the policy (an "occurrence" type policy). The Court of Appeals also ruled that it was not clear as to what constituted a "claim" and, consequently, the "If Claim" clause would be construed against Continental.

As for Continental's contention that the judgment be affirmed because of Links' breach of the cooperation condition, the Court of Appeals conceded (Appendix B, page B-14) that one of "The conditions of the policy which may have been broken by the Links (was) the cooperation clause . . ." Nevertheless, and despite the presence of the District Court's finding

that the Links failed to make a fair, frank and substantially full disclosure of material information, the Court of Appeals ruled that it would not consider breach of cooperation as grounds for affirming the District Court judgment because

> "Since it was ordered by the District Court that the reference to Links' breach of the cooperation be deleted from the orginal findings of fact and conclusions of law, it is taken that this has been considered and that there is no issue concerning a breach of that clause."

Following entry of the judgment of the Court of Appeals, Continental timely filed a Petition for Rehearing, but it was subsequently denied.

Reasons For Allowance of Writ

A. Under Montana law, insurance companies are not subject to application of different rules of contract law than those to be applied to individuals.[1] By direction of § 13-720, of the Montana Code, uncertain language of an insurance contract is to be construed against the insurer only if such uncertainty is not removed by statutory rules of contract interpretation preceding § 13-720, particularly, as applicable here, §§13-709, 13-710, 13-711 and 13-713. In holding the insurance contract to be ambiguous and the word "claim" unclear, and in construing the insurance contract against Petitioner, the Court of Appeals disre-

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[1] See § 13-701, Revised Codes of Montana: McDonald v. Northern Benefit Association, 113 Mont. 595, 131 P. 2d 479 (1942); Weidenaar v. New York Life Ins. Co., 36 Mont. 592, 94 Pac. 1 (1908).

garded Montana statutory rules of contract interpretation preceding § 13-720, i.e., § 13-709 (by construing the "If Claim" clause in a way which made the clause or contract, or both, inoperative, indefinite and unlawful) and §§ 13-710 and 13-711 (failing to construe the "If Claim" clause and the word "claim" in their ordinary and popular sense as understood by persons in the profession to whom claims for error, omission or negligent act are related[2]). As for the word "claim," the Montana Supreme Court has held "its meaning is plain,"[3] i.e., "To hold to be true against implied denial or doubt; affirm; assert"[4] and "the demand of something from some one on the ground

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[2] See Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Casualty Co., 465 F.2d 22 (9th Cir. 1972); Samuel L. Zarpas, Inc. v. Morrow, 215 F. Supp. 887 (D. N.J. 1963); San Pedro Properties, Inc. v. Sayre & Toso, Inc., 21 Cal. Rptr. 844 (Dist. Ct. App. 1962); J. M. Brown Const. Co. v. D. & M. Mechanical Contr., Inc., 222 So. 2d 93 (Ct. App. La. 1969); Livingston Parish School Board v. Fireman's Fund Insurance Co., 263 So. 2d 356 (Ct. App. La. 1972); Rotwein v. General Accident Group, 247 A. 2d 370 (Sup. Ct. N.J. 1968); cf. Lemmon, Freeth, Haines & Jones, Architects v. Underwriters at Lloyds, 484 P. 2d 141 (Hawaii 1971).

[3] Pollock Mining and Milling Co. v. Davenport, 31 Mont. 452, 78 Pac. 768 (1904). For construction of meaning of "claim" in architect insurance policies, by courts of another state, see San Pedro Properties, Inc. v. Sayre & Toso, Inc., supra, n.2, and Gribaldo, Jacobs, Jones & Asso. v. Agrippina Versicherunges A. G., 476 P. 2d 406 (Cal. 1970).

[4] Pollock Mining and Milling Co. v. Davenport, supra, n. 3.

of right."[5] Although rehearing in banc was suggested, the decision of the Court of Appeals herein remains inconsistent with a decision of another panel of the same court rendered just a few months earlier.[6]

The reasoning of the Court of Appeals that "Continental cannot claim that the policy requires occurrence of an act or omission within the policy period for there to be coverage, and then deny that the policy is an occurrence policy" is also conflicting with decisional law[7] of the Montana Supreme Court.

By proper application of Montana rules of contract interpretation, as a matter of law a claim was not made against the Links for error, omission or negligent act within the policy period. If, however, uncertainty existed in the contract, Montana law permitted such uncertainty to be explained by reference to the circumstances under which it was made and the matter to which it relates.[8] Extrinsic evidence is admissible to aid a judge in interpreting the language of a contract for its proper construction and to show that terms of a written contract have a local, technical, or other peculiar signification and were used and understood in the particular instance.[9] If the terms of an in-

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[5] In re Oppenheimer's Estate, 73 Mont. 560, 238 Pac. 599 (1925).
[6] Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Casualty Co., supra, n. 2.
[7] Outlook Farmers Elevator Co. v. American Surety Co., 70 Mont. 8, 223 Pac. 905 (1924).
[8] § 13-713, R.C.M.
[9] §§ 93-401-17 and 93-401-18, R.C.M.

surance contract are uncertain, extrinsic evidence is admissible to aid in the interpretation of the terms and provisions used therein.[10] The District Court having refused to admit, hear or consider the extrinsic evidence Petitioner sought to introduce which would have aided in interpreting the insurance contract, and the Court of Appeals having put the District Court in error by holding that the policy and the word "claim" were unclear, it was contrary to due process of the law, Petitioner's right of trial on a factual issue, and the decisions of this court[11] for the Court of Appeals to reverse and direct entry of judgment against Petitioner without remanding for futher proceedings to afford Petitioner the opportunity to introduce evidence it was precluded from introducing

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[10] See §§ 13-701, 13-713, 93-401-17 and 93-401-18, R.C.M. 1947. Accord, Peerless Casualty Co. v. Mountain States Mutual Casualty Co., 283 F. 2d 268 (9th Cir. 1960-construing Montana law); Gribaldo, Jacobs, Jones and Associates v. Agrippina Versicherunges A. G., supra, n. 3 (architect insurance contract). Also see, e.g., Home Insurance Co. v. Pinski Bros., Inc., 156 Mont. 246, 479 P. 2d 275 (1971); and Brown v. Homestake Exploration Co., 98 Mont. 305, 39 P. 2d 168 (1934).

[11] See Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S. Ct. 893, 2L. ed. 2d 953 (1958); and Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L. ed. 971 (1949). Cf. Globe Liquor Company v. San Roman, 332 U.S. 571, 68 S.Ct. 246, 92 L. ed. 177 (1948); Cone v. West Virginia Pulp and Paper Company, 330 U.S. 212, 67 S.Ct. 752, 91 L. ed. 849 (1947); and Jaffke v. Dunham, 352 U.S. 280, 77 S.Ct. 307, 1 L. ed. 2d 314 (1957).

by the District Court. This, obviously, was not only a departure by the Court of Appeals from the accepted and usual course of judicial proceedings, but, if allowed to go uncorrected, sanctions a similar departure by the District Court. The improper exclusion of extrinsic evidence by the District Court having been pointed out to the Court of Appeals on Petition for Rehearing and remand having been suggested, it is contrary to the position of this court to allow the decision of the Court of Appeals to remain uncorrected.[12]

B. Although there appear to be no Montana decisions exactly on point, the general, if not universal, rule is that failure on the part of an insured to make a fair, frank and substantially full disclosure of information to his insurer, is a breach of the cooperation condition of an insurance policy.[13] The District Court specifically found that although J. G. Link knew of squeaks in the building in September or October, 1966, he, nevertheless, failed to give Petitioner a fair, frank and substantially full disclosure of this material information when he told Petitioner on October 6, 1967, that the first he knew of any squeaks was in May, 1967. Although the District Court initially concluded that such failure to disclose was a breach of the cooperation condition and an additional reason for entering judgment in favor of Petitioner, the

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[12] See Neely v. Eby Construction Co., 386 U.S. 317, 87 S. Ct. 1072, 18 L. ed. 2d 75 (1967).

[13] See, e.g., 14 Couch on Insurance 2d, § 51:103: 8 Appleman, Insurance Law and Practice, §§ 4774 and 4782.

District Court later deleted the **conclusion** as a ground for Petitioner's judgment. Even though the Court of Appeals conceded that there may have been a breach of the cooperation condition of the policy, it declined to consider if such breach was ground for affirming the District Court judgment because, as it avowed, it assumed the District Court had considered it and determined that it was not an issue.

The rule has long been established that a prevailing party in the District Court may, on appeal, sustain his judgment on any ground[14] and by any theory, argument or contention which is supported by the record, even though it was specifically rejected by the District Court.[15] A prevailing party may also without cross-appealing, urge in support of a decree any matter appearing in the record, even though his argument may involve an attack upon the reasoning of the District Court or an insistence upon matter overlooked or ignored by it.[16]

The court of Appeals patently erred by refusing to consider the grounds conceded by it as having possible merit for affirming the judgment of the District

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[14] See, e.g., Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.ed. 2d 491 (1970); Jaffke v. Dunham, supra, n. 11; and Helvering v. Gowran, 302 U.S. 238, 58 S. Ct. 154, 82 L. ed. 224 (1937). See Annot. 1 L. ed. 2d 1820.

[15] See 9 Moore's Federal Practice, ¶ 204.11[3], p. 938.

[16] See, e.g., Dandridge v. Williams, supra, n. 14; Jaffke v. Dunham, supra, n. 11; and United States v. American Railway Express Co., 265 U.S. 425, 44 S.Ct. 560, 68 L. ed. 1087 (1924).

Court. To permit such a well established and recently repeated[17] rule to be circumvented by a Court of Appeals, through the simple expediency of abstaining from resolving a contention of an appellant therein or by assuming that the District Court determined that no issue existed, directly conflicts with untold numbers of decisions of this Supreme Court.[18] Although the Court of Appeals, perhaps, may be in a position to consider and resolve this contention itself,[19] the case should be remanded to the District Court for resolution of the issue in light of the evidence and the trial judge's concept of the local law.[20]

Unquestionably, the Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to consider a ground and contention of Petitioner, supported by the record, for affirming the District Court judgment. Such departure is in conflict with the many decisions of this court, and, if uncorrected, will certainly stand as precedent as a way by which the rule may be circumvented.

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[17] Dandridge v. Williams, supra, n. 14.

[18] See n. 14-16, supra.

[19] Cf. Bank of America National Trust and Savings Asso. v. Parnell, 352 U.S. 29, 77 S.Ct. 119, 1 L. ed. 2d 93 (1956); and Weade v. Dichmann, Wright & Pugh, 337 U.S. 801, 69 S.Ct. 1326, 93 L. ed. 1704 (1949).

[20] Lumbermens Mutual Casualty Co. v. Harleysville Mutual Casualty Co., 367 F. 2d 250 (4th Cir. 1966). See Iacurci v. Lummus Co., 387 U.S. 86, 87 S.Ct. 1423, 18 L. ed. 2d 581 (1967); cf. Neely v. Eby Construction Co., supra, n. 12.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Appendices

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

J. G. LINK & COMPANY, a Co-Partnership, of J. G. LINK and ELMER F. LINK,

Plaintiffs,

No. 1574

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant.

WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Plaintiffs,

No. 1667

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant.

Findings of Fact
and
Conclusions of Law

The above entitled causes having been consolidated for trial came on regularly for trial on the 13th day of December, 1968, before the above entitled court sitting without a jury and was concluded on December 14, 1968. Mr. Robert A. Poore of the law firm of Poore, McKenzie, Roth & Robischon appeared as counsel for the plaintiffs Wayrynen, and Neil J. Lynch of the law firm of Genzberger, Genzberger & Lynch appeared as counsel for the plaintiffs Link, and Messrs. Alex Blewett, Jr., and Jack L. Lewis of the law firm of Jardine, Stephenson, Blewett & Weaver appeared as counsel for the defendant Continental Casualty Co. The parties announced that they were ready for trial, and thereupon evidence was offered in support of the plaintiffs' complaints and of the defendant's answer, and, both sides having rested, the cause was submitted to the court for decision and judgment.

And the court now being fully advised as to the facts of the matter and the applicable law, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Facts
I

This action had its inception when Wayrynen Funeral Home, Inc., a Montana Corporation, together with Mr. and Mrs. Ray Wayrynen, citizens of Montana (all

hereinafter collectively referred to as Wayrynens), initiated an action in state district court against architects J. G. Link & Company, a Co-Partnership of J. G. Link (of Butte, Montana) and Elmer F. Link (of Billings, Montana), also citizens of Montana (sometimes hereinafter collectively and singularly referred to as Links or architects), Thomas B. Lutey, a building contractor (not involved in this litigation but sometimes hereinafter referred to as Lutey or contractor), and others not here involved. That action involved a claim for damages in the amount of $140,000.00 arising out of the construction of a funeral home for Wayrynens by Lutey, the plans and specifications for which were prepared by Links. In that action, Links filed a Third Party Complaint against Continental Casualty Company, an Illinois Corporation (hereinafter referred to as Continental), insurer of Links under an architect's errors and omissions policy, seeking to establish that the Links were insured for the matters alleged in Wayrynens' complaint. Upon being served with process, Continental removed the entire action to this court. Motion was thereupon made to remand the action to state court. This court, in ruling upon the motion to remand, retained jurisdiction of the Third Party Complaint and remanded the original action by the Wayrynens against the Links and others to state court (Wayrynen Funeral Home, Inc. v. J. G. Link & Company, 279 F. Supp. 803). Subsequently, the Wayrynens moved to intervene as plaintiffs in this action, which motion

was denied. Thereafter, the Wayrynens proceeded to trial in the state district court against the defendants in that action, including Lutey and the Links, and obtained a judgment against Lutey and the Links, which, as against the latter, amounted to the total sum of $73,342.00, plus costs of suit. The Links appealed the judgment of the state court to the Montana Supreme Court on the matter of damages only, which appeal has now been dismissed and the judgment is final. While the appeal was pending the Wayrynens filed an action in this court against Continental seeking to obtain payment from Continental in the amount of the state court judgment upon essentially the same grounds asserted by the Links against Continental, i.e., Continental insured the Links for the matters involved in the state court action and that Continental, in turn, was obligated to pay the Wayrynens such amount of that judgment as became final. The following facts led up to this litigation.

II

In the middle of October, 1965, the Wayrynens entered into an oral contract with the Links whereby J. G. Link was to draw plans and prepare specifications for the construction of a funeral home. Under this oral contract, J. G. Link was to handle the reception of bids, the awarding of contracts, supervise construction, and certify periodic and final payments due to the contractors upon proper performance of the work.

III

Sometime prior to November 11, 1965, Elmer F. Link advised one Pinky Hoiness, an insurance broker who had handled all of Elmer Link's insurance needs for some twenty years, that J. G. Link & Company was in need of architect's errors and omissions insurance to comply with Montana statutory requirements for architects performing architectural duties on state projects; such insurance was ordered and acquired by Mr. Hoiness, as agent for the Links, and is the policy of insurance here involved.

IV

The Insurance policy here involved and written by Continental insured the Links for the policy period November 11, 1965, to November 11, 1966, 12:01 A.M. standard time, Billings, Montana, in the amount of $100,000.00, subject to certain loss contribution and deductible as provided therein. Under the insurance policy (as pertinent to this action) Continental "* * * in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all the terms of (the) policy" agreed with the Links as follows:

"Part I

Insuring Agreements

1. Coverage

The Company will pay on behalf of the insured all sums which the insured shall become legally

obligated to pay as damages if legal liability arises out of the performance of professional services for others in the insured's capacity as an architect or an engineer and if such legal liability is caused by an error, omission or negligent act.

• • • • •

IV. Policy Period, Territory

(a) During the Policy Period

The insurance afforded by this policy applies to errors, omissions or negligent acts which occur within the United States of America, its territories or possessions, or Canada during this policy period if claim therefor is first made against the insured during this policy period.

"Part IV

Conditions

1. Notice of Claim or Suit

The insured shall, as soon as practicable after receiving information as to his alleged errors, omissions or negligent acts, give written notice thereof to the Company with full particulars of any claim arising therefrom. The written notice shall be sent to the Company's Home Office at 310 South Michigan Avenue, Chicago, Illinois, 60604.

3. Assistance and Cooperation of the Insured
The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trial and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. Except at his own cost, the insured shall not voluntarily make any payment, assume any obligation or incur any expense, including redesign fees, reworking fees, redrafting fees or any other expense, unless incurred with the consent of the Company.

* * * * *

5. Action against Company
No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial, arbitration or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the insured to

determine the insured's liability.

• • • • •

9. Changes

Notice to any agent or knowledge possessed by an agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form part of this policy, signed by a duly authorized agent of the Company."

The above insurance provisions are similar, if not the same, as architect's and engineer's insurance policies of other companies.

V

J. G. Link prepared plans and specifications for the proposed funeral home of the Wayrynens and on June 6, 1966, Lutey, a contractor with some 20 years' experience in the contracting and construction business, was awarded the contract for the construction of the funeral home per plans and specifications of the Links. Thereupon Lutey commenced work on the construction project by making excavations, installing footings, erecting block walls and preparing for the arrival of steel joists necessary in the construction of a second story. The plans and specifications called for a two-story funeral home with a portion of the

second story to be an apartment for Mr. and Mrs. Wayrynen. The schedule of construction and completion of the business portion of the funeral home had priority over the construction and completion of the apartment. The contractor and the architect were advised by the Wayrynens that the business portion of the funeral home had to be completed for business by Christmas, 1966, but that the apartment or living quarters could be done after January 1, 1967.

VI

The steel joists arrived on the job site about Labor Day, 1966, and were erected by September 19, 1966. In constructing the floor of the second story, two layers of plywood were to be affixed to the top of the steel joists. The floor of the second story was then to be completed by laying a rubber paid or mat and a carpet upon the double layer of plywood.

VII

Between September 19, 1966, and September 26, 1966, installation of the plywood decking of the second story floor began. The plywood flooring was laid and completed in the business portion of the funeral home by the middle of October, 1966, but was not laid in the living quarters until the first part of January, 1967.

VIII

That as soon as plywood was laid on the second

floor so that it would safely support foot traffic, Mr. and Mrs. Wayrynen commenced visiting the project and inspecting the work in the evenings after the workmen had left. On occasions they were accompanied by the contractor, Mr. Lutey, or his foreman, Mr. Connolly or the interior decorator, Mrs. O'Meara. From the very first of those inspection trips, dating as early as September 26, 1966, the Wayrynens noticed that the second floor squeaked.

IX

That such squeaks were grossly disturbing to the Wayrynens and were wholly inconsistent with the specified, contractual goal of a quiet, dignified and peaceful atmosphere in the new funeral home, and the Wayrynens promptly called the same to the attention of the architects and of the general contractor who, in turn, again took the matter up with the architects. Thus, on or shortly before October 5, 1966, Mrs. Wayrynen in the company of the interior decorator, Mrs. O'Meara, advised J. G. Link that the second floor was squeaking. Mrs. Wayrynen also repeatedly called this same condition to the attention of the general contractor, Mr. Lutey, who was on the job-site much more than the architect during the period from late September through October and November, 1966. One particular occasion which could be pinpointed as to time occurred on or about the first of November, when Mrs. Wayrynen and Mrs. O'Meara were assisted to the second floor by Mr. Lutey and Mr. Connolly,

his foreman, via a ladder then situated in the aperture where the spiral stairway was later constructed. The construction picture of November 14, 1966, received in evidence depicts such stairway and the circular template upon which the same rests and which template and construction took at least two weeks to design and build to the stage shown. Hence, on the date of November 1, 1966, or earlier, Mrs. Wayrynen and Mrs. O'Meara, in the company of Mr. Lutey and Mr. Connolly, visited the second floor and all heard the offensive squeaks of which the Wayrynens were complaining. And on October 20, 1966, at the home of J. G. Link, Mr. Lutey advised Mr. Link that Mrs. Wayrynen was still complaining about the squeaking floor, and Mr. Link stated that they would have to go through and nail the floor down again and find a way to fasten it down.

X

That certain sections of the second floor and particularly those between the arrangement room office and the selection room and also in the hallway between the living quarters and the arrangement room office were renailed in October, 1966, as a result of the Wayrynen complaints and the squeaks thereby eliminated for a short time but then returned. And after the carpet and pad were laid in December and the squeaks still persisted, the floor was re-nailed right through such carpet and the pad.

XI

That although the architect, J. G. Link, advised the general contractor on October 20, 1966, that they would just have to find a way to fasten the floor down so as to eliminate the squeaks such way was never found, and presently the floor squeaks; and such squeaks are of the same nature as were initially cited to Mr. Link, as aforesaid, during the months of September and October of 1966.

XII

That during the week of May 13, 1968, just prior to the trial of the suit by the Wayrynens against the Links and others in the state court of Montana, a randomly-chosen section of the ceiling of the Gold Lounge Room on the first floor was removed so as to expose the steel joists, nailers and undercourse of plywood of the second floor; and an inspection was conducted of the 2"x4" planks of the steel joists and the undercourse of plywood flooring. That it was found that all or substantially all of 2" roofing nails which had been used to nail the 2"x4" planks to the steel joists had either backed out of the planks about ¼" or, if the nail was flush against the steel joist, the joist had pulled away from the nailer about the same distance—i.e., ¼". Thus, in a number of the places along the joists a carpenter's folding rule could be inserted between the steel joist and the 2"x4" nailer, and there was other separation of materials evident. That when traffic moved about on

the second floor above this exposed area, it was noted that the wooden laminations of plywood and 2" x 4" nailers depressed under the weight of the persons walking about; and such depression in one place would raise adjacent areas and thus create a rippling effect through the floor laminations. That such movement of the wooden laminations resulted in very audible floor squeaks. That there also appeared to be a high sound transmission factor by virtue of the hollow area between the second floor flooring and the plasterboard ceiling of the first floor rooms.

XIII

That the second floor overlays the main foyer and building entrance through which all funeral clientele traffic and mourners must pass. It also overlays the business office where clientele frequently stop. Also it overlays the Gold Room Chapel and a smoking lounge area frequented by clientele. It further overlays the north end of the main Chapel which is occasionally used for separate funeral services. And although it does not overlay the main Chapel, it does lie over the family room which is immediately adjacent to the main Chapel where the immediate family are sitting during funerals. That the business arrangements office and funeral paraphernalia selection room are located on the second floor and clientele make repeated visits to these rooms in the course of arranging for and concluding a funeral.

XIV

That any traffic by clientele to the second floor arrangements and selection rooms or by the apartment managers or their visitors or guests on the second floor results in offensive floor squeaks and other eerie noises that are grossly disturbing both to the clientele who are moving about making such noises and also to any mourners or visitors downstairs in the first-floor areas. That the squeaky and noisy second floor constitutes a material and serious defect in the building which must be corrected to attain good, sound workmanship and first-class construction and meet the specified contract goal of a quiet, peaceful and dignified atmosphere. That the defect can be corrected by removing the present second floor wooden flooring so as to expose the top chord of the steel joists, then weld corrugated metal sheeting to the joists and overlay such metal platform with three inches of concrete.

XV

That in June, 1967, the plaintiffs above brought suit against the Links and others in the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow as cause No. 54,746 of said Court.

XVI

After service of summons and complaint upon the

Links, their personal attorney of Billings, Montana, by letter dated June 23, 1967, sent a copy of the summons and complaint to Continental. This was received by Continental on June 29, 1967, and was the first notice given by the Links to Continental of any complaint about squeaky floors. Receipt by Continental of that summons and complaint was its first knowledge of an alleged claim or complaint against the Links arising out of the funeral home construction project. Shortly thereafter, Links' attorney received a telephone call from someone with Continental inquiring about the litigation, and the attorney for the Links inquired as to whether or not Continental was going to get its attorney into the case and take it over; to this, the response was that Continental doubted if it was on the risk.

XVII

Sometime after Continental received a copy of the summons and complaint, but prior to July 18, 1967, Continental referred the matter to the Billings office of Tobin Adjusters, Incorporated, (Tobin) for investigation. On July 18, 1967, the matter was referred to Tobin's office in Butte for the purpose of contacting J. G. Link for details and report to Continental. At the time of the referral, Tobin was notified by Continental that there was a question of insurance coverage for the loss asserted in the complaint and that Tobin was to obtain a statement from Links and proceed with investigation from there.

XVIII

After attempting to contact Links several times, Tobin reached J. G. Link on August 7, 1967, and asked him to come to the Tobin office that afternoon. Mr. Link, however, by a later telephone call, advised Tobin that he would have to call the attorney for the Links in Billings. Thereupon, Tobin called Links' attorney in Billings and was advised that the attorney then wanted a definite answer on whether or not the Links had insurance coverage; futher, the attorney advised Tobin that if there was insurance coverage, he would cooperate, but that if there was no coverage he would not give Tobin any information. Tobin notified Links' attorney that there was an insurance coverage question which had to be clarified through J. G. Link and that Tobin was in no position to make any commitments on coverage without benefit of information from the insured. Links' attorney had instructed the Links not to talk with representatives of Continental as, according to that attorney, he wanted to find out what Continental's attitude was toward insurance coverage for the Links. With this refusal of information, an impasse was reached by Continental in obtaining information from the Links.

XIX

Being refused any information from Links as to when a claim had first been made against Links for the matters stated in the Wayrynen compaint, and Continental's only information being that a claim had

not been made by the Wayrynens within the policy period which would result in no insurance coverage, Continental wrote a letter to the Links on September 25, 1967, disclaiming insurance coverage upon the grounds that suit was filed after the Links' policy had expired and upon the further grounds that no claim had been made by the Wayrynens during the policy period.

XX

On September 28, 1967, Continental followed with a letter to Links' attorney explaining that Continental did not know if insurance coverage existed and could not agree that there was insurance coverage until Continental had certain facts from the insured sufficient to determine if there was insurance coverage. Continental, by this letter, again requested the Links' attorney to permit Tobin to obtain insurance coverage information from the Links.

XXI

On October 3, 1967, Tobin wrote the Link's attorney also advising that Continental needed certain limited facts in order to establish the possibilty of Links having insurance coverage, and requested the attorney to advise Tobin if he would permit Links to give Tobin a statement with regard to those facts.

XXII

On October 6, 1967, Tobin received a telephone call

from Links' attorney advising Tobin that, upon the condition Continental would commit itself by five o'clock P.M. that date as to whether or not it would afford insurance coverage to the Links on the Wayrynen action, he would cooperate and let Links be interviewed for limited information as to insurance coverage. Tobin thereupon contacted J. G. Link and had Mr. Link come to the Tobin office that afternoon.

XXIII

After J. G. Link arrived at the Tobin office that afternoon, Mr. Link told Tobin that he would discuss the matter with Tobin, but would not give Tobin any written or recorded statement without the Links' attorney being present. The matter was then discussed by Tobin and J. G. Link. During this discussion, J. G. Link told Tobin that the first complaint ever registered to the Links regarding the floor squeaking was when he received a summons or a subpoena in May, 1967, demanding that he attend a meeting at the Wayrynen funeral home.

XXIV

While J. G. Link was still in the Tobin office, Tobin called Continental's claim manager in Denver and explained what Link had told Tobin. Tobin then had J. G. Link talk with the claims manager on the telephone and J. G. Link also told the claims manager that he knew nothing about any squeaking floors in the fun-

eral home until he received the letter in May, 1967, demanding that he attend the meeting at the Wayrynen funeral home.

XXV

Based upon what Continental had determined from J. G. Link during the conference and telephone conversation of October 6, 1967, Continental on the same day telephoned the Links' attorney and advised him that Continental was in fact refusing coverage. This telephone call was confirmed by letter dated October 9, 1967.

XXVI

Upon the denial of insurance coverage, the Links' attorney proceeded with the defense and trial of the Wayrynen action in state court against the Links, et al. In that action, judgment went against Lutey and Links and in favor of the Wayrynens. Judgment in the sum of $73,342.00 damages, plus costs, against the Links was based on a finding that they had not properly discharged their professional duties to the Wayrynens; that the Links wrongfully walked off the project in December, 1966, and that the Links negligently failed to supervise and inspect the project.

XXVII

That Elmer F. Link and J. G. Link, Jr., as co-partners contracted to and did perform professional ser-

vices for WayrynenFuneral Home, Inc. and Ray Wayrynen and Mrs. Wayrynen in the design and construction of the New Wayrynen Funeral Home and managers' apartment at 1800 Florence Boulevard, Butte, Montana; however, such professional services were characterized by and contained the following errors, omissions and negligent acts:

(a) Said architects failed to design a funeral home and managers' apartment therein which would be quiet, peaceful and dignified and contain an apartment which could be reasonably used as an apartment and home for the resident managers during non-business hours.

(b) Said architects failed to provide for proper and appropriate sound insulation.

(c) Said architects in specifying a type of second floor construction of steel joists overlaid by laminated wooden members negligently failed to specify a manner of securing the wooden floor members to the steel joists such that there would be no "working" of the floor components, one to the other, and a resulting separation of materials.

(d) Said architects were absent from the construction project during much of October, when second floor difficulties were being noted, and all of November and wrongfully walked off of said project in December, 1966, without cause and without notifing the Wayrynens and negligently failed to supervise and inspect said project and to use their training and skills as architects and engineers in noting and correcting structural defects as the same developed; and particularly in permitting the attempt by the general contractor, Lutey, to secure the 2" x 4" wood nailer to the steel joists by a common two inch (2") roofing nail.

(e) Said architects failed to make an appropriate study and investigation of the required rigidity or firmness necessary to laminate the wooden floor members to the steel joists.

(f) Said architects failed to compute the necessary diameter shaft for any device for securing the wooden floor members to the steel joist so as to present an adequate bearing surface on the wooden members, and to specify this diameter hole to the manufacturer of the steel joists for punching.

(g) Said architects negligently permitted and caused the design and construction of a building which at all times was under their supervision and control and the second floor of which does not represent good, sound workmanship; and the present and apparent floor deficiencies are themselves proof of the negligence of the architects.

XXVIII

That the negligent acts or omissions were wholly performed or omitted during the period from November 11, 1965, to November 11, 1966.

From the foregoing facts the court draws the following

Conclusions of Law

I

That diversity of citzenship exists between each of the parties plaintiff and defendant in both causes No. 1574 and No. 1667, and the amount in controversy exceeds $10,000.00; that the court has jurisdiction of the subject matter and the parties.

II

The rights of the Wayrynens against Continental, if any, are co-extensive with any rights of the Links (hereinafter sometimes referred to as insured) against Continental and are subject to the same defenses Continental has against the Links.

III

If insurance coverage is otherwise afforded by the insurance policy here involved, nevertheless, the requirement of the insurance policy that the insured shall, as soon as practicable after receiving information as to his alleged errors, omissions or negligent acts, give written notice thereof to Continental (paragraph 1 of Conditions) is a condition precedent which must be proven by the plaintiffs for the establishment and enforcement of such insurance coverage.

IV

The Links failed to give notice to Continental as soon as practicable after receiving information as to their alleged errors, omissions or negligent acts.

V

The failure on the part of the Links to give notice to Continental as soon as practicable after receiving information as to their alleged errors, omissions or negligent acts is not in compliance with the terms and conditions of the insurance policy here involved;

such failure is in violation of the terms and conditions thereof.

VI

When Continental in October, 1967, denied insurance coverage on the grounds that no claim for error, omission or negligent act was made during the policy period, Continental was entitled to rely upon the information given to it by J. G. Link on October 6, 1967, that the first he knew of any squeaking in the floor of the Wayrynen funeral home was in May, 1967.

VII

As to the notice requirements of the insurance policy here involved, Continental did not waive and cannot be held to have waived such requirements nor is Continental estopped from defending these actions upon the grounds of the late notice. There is no such waiver or estoppel by reason of each of the following:

(a) The giving of prompt notice, or that notice required of the Links under the insurance policy, is a condition precedent to insurance coverage which must be proven by the plaintiffs.

(b) There is no and can be no waiver of or estoppel from asserting the notice requirements or provisions of an insurance policy when there is a disclaimer of coverage.

(c) There is no and can be no waiver of or estoppel from asserting the notice requirements or provi-

sions of an insurance policy when there is a disclaimer of coverage and the time for giving of notic has already expired.

(d) At the time Continental disclaimed insurance coverage, it did so without having full knowledge of the facts of late notice.

(e) At the time Continental ultimately disclaimed insurance coverage to the Links on grounds other than late notice, such disclaimer was based upon information given to Continental by the Links.

(f) Continental was misled by the Links into disclaiming insurance coverage on grounds other than late notice.

(g) Waiver by and estoppel of Continental is not applicable in this case in any event unless the Links were misled to their prejudice by the disclaimer of insurance coverage on grounds other than late notice; in this case, the plaintiffs have failed to prove that the Links either were misled or were prejudiced by the denial of insurance coverage on grounds other than late notice; the evidence proved that the Links were neither misled nor prejudiced by the denial of insurance coverage on grounds other than late notice.

(h) The terms of the insurance policy here involved were not waived or changed by any endorsement issued to form part of the policy as required by paragraph 9 of the Conditions.

VIII

Continental's denial of insurance coverage to the Links was based upon information given to it by the Links, which information, had it been true, established that no claim was made against the Links during the policy period for error, omission or negligent act; Continental was prejudiced by this information upon which information it was entitled to rely; the plaintiffs are estopped from now asserting that a claim for error, omission or negligent act was made against the Links during the policy period.

IX

Continental's denial of insurance coverage to the Links was based upon information given to it by the Links, which information, had it been true, established that no claim was made against the Links during the policy period for error, omission or negligent act; Continental was prejudiced by this information upon which information it was entitled to rely; the plaintiffs are now barred by reason of laches from now asserting that a claim for error, omission or negligent act was made against the Links during the policy period.

X

When the Links on October 6, 1967, advised Continental that the first time any squeaks in the funeral home were known by the Links was in May, 1967, the

Links were duty bound to give Continental a fair, frank and substantially full disclosure of information; if the Links did know of squeaks in the funeral home in September or October, 1966, as they now say they did, and as the court so finds, then a fair, frank and substantially full disclosure of material information was not given to Continental on October 6, 1967.

XI

The Links breached the terms and conditions of the insurance policy here involved as above described; the Links are not afforded insurance coverage under such policy for the matters involved in the state court action of the Wayrynens against the Links.

Let judgment be entered for the defendant in each cause herein.

Done and dated this 12th day of September, 1969.

/s/ W. D. Murray

W. D. Murray
Senior United States District Judge

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. G. Link & Company, a Co-Partnership of J. G. Link and Elmer F. Link,

Plaintiffs-Appellants,

vs.

Continental Casualty Company, an Illinois Corporation,

Defendant-Appellee.

No. 26,220

Wayrynen Funeral Home, Inc., a Montana Corporation, and Ray Wayrynen and Mrs. Ray Wayrynen,

Plaintiffs-Appellants,

vs.

Continental Casualty Company, an Illinois Corporation,

Defendant-Appellee.

[December 15, 1972]

Appeal from the United States District Court for the District of Montana

Before: HAMLEY and HUFSTEDLER, Circuit Judges, and MUECKE, District Judge.*

*Honorable C. A. Muecke, United States District Judge, District of Arizona, sitting by designation.

MUECKE, District Judge:

This case deals with an architect's error and omission insurance policy. The action had its inception when Wayrynen Funeral Home, Inc., a Montana corporation, together with Mr. and Mrs. Ray Wayrynen (hereinafter called the Wayrynens) initiated an action in the state court against the architectural partnership of J. G. Link & Company (hereinafter called the Links), and other parties not involved here. The state action involved a suit for damages filed by the Wayrynens arising out of a claim against the Links for negligent design and construction of a funeral home built for the Wayrynens.

In the state action, the Links filed a third party complaint against Continental Casualty Company, an Illinois corporation (hereinafter called Continental), as the insurer of the Links under an architect's error and omission policy. Continental removed the entire action to the United States District Court for the District of Montana. The District Court remanded the orginal action by the Wayrynens against the Links, but it retained jurisdiction over the third party complaint. A motion by the Wayrynens to intervene as third party plaintiffs in the District Court was denied.

Thereafter, the Wayrynens obtained a judgment in state court, in part against the Links, and after appeal to the state supreme court on the issue of damages, the state court judgment became final. While the state court appeal was pending, the Wayrynens initiated a second suit against Continental in the District

Court seeking payment from Continental in the amount of its state court judgment. Upon motion by the plaintiffs, the Links and the Wayrynens, the two causes were ordered consolidated for trial. Judgment was entered in favor of Continental and against both plaintiffs, who filed this appeal.

The essential District Court findings of fact and conclusions of law follow. Prior to November 11, 1965, the Links arranged through a broker to obtain an architect's error and omission insurance policy to comply with a Montana statutory requirement for architects performing architectural duties on state projects. The policy period was from November 11, 1965 to November 11, 1966. Coverage under the policy was for legal liability "caused by error, omission, or negligent act " of the insured. Insurance was afforded only "if claim . . . is first made against the insured during this policy period." A condition of the policy was that the insured "as soon as practicable after receiving information as to his alleged errors, omissions or negligent acts, give written notice therof to the Company . . ." Another clause required cooperation of the insured in the conduct of any suits. The only other pertinent provision required compliance by the insured with the terms of the policy for any action to lie against the insurance company.

During October 1965, J. G. Link of J. G. Link & Company entered an oral contract with the Wayrynens whereby the Links were to plan and supervise construction of a funeral home. Construction was

begun by a contractor named Luety. While the building was under construction and sometime before October 5, 1966, Mrs. Wayrynen advised J. G. Link of squeaks that had developed in the second floor. The squeaks were called to the attention of the contractors, but all the steps taken to remedy the squeaks were to no avail. Sometime in May 1967, J. G. Link attended a meeting at the Wayrynen funeral home where the squeaking floor was discussed. Thereafter, in June 1967, the Wayrynens initiated their action in state court.

After service of summons and complaint on the Links, by letter dated June 23, 1967, which was received by Continental on June 29, 1967, the Links notified Continental of the impending suit. Continental referred the matter to a local adjuster for investigation sometime prior to July 18, 1967. After several attempts by the adjuster to contact Link to discuss insurance coverage, a letter of September 25, 1967 from Continental to the Links disclaimed coverage. Another letter to the Links' attorney dated September 28, 1967 left the matter of coverage open due to a lack of information. Finally, a meeting was held on October 6, 1967, at which time J. G. Link told the adjuster that his first knowledge of the squeaking floors came when he received notice of the May 1967 meeting at the Wayrynen's funeral home.

It should be noted that by letter dated September 18, 1967, before Continental disclaimed coverage as to the Links, the Wayrynens offered to provide Con-

tinental with the information necessary so that no forfeiture of insurance would occur. This first letter was followed by a second on September 26, 1967 which notified Continental of the dates of depositions to be taken of certain parties to the state court action.

By reason of the disclaimer of coverage by Continental, the Links defended the state court action through their own attorney. Judgment against the Links was essentially for negligent design and for negligently failing to supervise and inspect the construction of the funeral home.

In the action in the United States District Court against Continental by the Wayrynens and the Links, the Court concluded that coverage did not extend to the Links since the Links failed to give notice to Continental as soon as practicable after receiving information as to their errors, omissions, or negligent acts. This, it was found, was in derogation of provisions in the insurance policy. Even though Continental had defended against coverage primarily on the basis that coverage was not afforded in that "no claim" had been made during the period of the policy, the Court concluded that Continental was not estopped from also asserting that notice of the claim was untimely. The court found that Continental was not estopped because when Continental denied coverage on the basis that no claim had been made during the period of the policy, it was entitled to rely on Link's representation of October 6, 1967 that the first he knew of any squeaking was in May 1967. The District Court

further found there was no waiver by Continental in asserting the notice provision since, it was concluded, Continental was misled by the Links into disclaiming on other grounds. Having misled Continental, the District Court determined that the Links were estopped from asserting that a claim for error had been made during the policy period which would have entitled them to coverage. Finally, the District Court concluded that the rights of the Wayrynens were coextensive with the rights of the Links, hence the Wayrynens were denied any coverage due to the estoppel of the Links.

Of the many contentions of both parties, we deal primarily with two issues. Does the "if claim" clause of the instant insurance policy, which requires that claim be made against the insured during the policy period, violate the public policy of Montana as asserted by appellants? And, are the rights of the injured Wayrynens under the instant policy coextensive with the rights of the insured party, the Links as determined by the District Court?

DOES THE "IF CLAIM" CLAUSE OF THE INSURANCE POLICY VIOLATE MONTANA PUBLIC POLICY?

Appellants contend, in essence, that the insurance policy in question here is an "occurrence" policy which is void under R.C.M. §13-806 insofar as it limits the time within which the insured may enforce his rights. R.C.M. §13-806 provides:

> **Restraints upon legal proceedings.** Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

Appellants argue further that the policy is void under Montana case law insofar as this insurance contract creates a condition impossible of fulfillment. **Carl Weissman & Sons, Inc. v. St. Paul Fire & Marine Insurance Co.,** 152 Mont. 291, 448 P.2d 740 (1968). Appellee contends that the policy in issue is not void as against public policy since it merely creates a condition precedent to enforcement of a right. Being a condition precedent, it is argued that a claim must be made within the policy period before any right exists which might be affected by R.C.M. §13-806. In essence, appellee seems to be saying that the policy in question is valid as a "discovery" policy.

It is, of course, a fundamental principle of insurance law that ambiguous insurance contracts will be construed against the insurer. **National Farmers Union Property & Casualty Co. v. Colbrese,** 386 F.2d 405 (9th Cir. 1966) cert. denied 368 U.S. 991, 87 S. Ct. 306, 18 L.Ed. 336 (1967); **Keating v. Universal Underwriters,** 133 Mont. 89, 320 P.2d 351 (1958); **Cacic v. Slovenska Narodna Podporna Jednota,** 102 Mont. 438, 59 P.2d 910 (1936). In the instant case, the insurance contract is ambiguous in that it is not clear whether the policy is a "discovery" or an "occurrence" policy,

and it is likewise unclear whether information given the insured in October 1966 constituted a claim within the terms of the policy. An insurance company will not be permitted to deny liability under a policy that is so vague that no matter what the circumstances, the company may deny that coverage exists.

This case presents such a situation. If the insurance policy is considered a "discovery" policy, that is one in which the policy is effective only if the act or omission is discovered during the policy period no matter when the act or omission occurred, **Samuel N. Zarpas, Inc. v. Morrow,** 215 F.Supp. 887, 888 (D.N.J.1963), then for coverage of the Links to exist a claim would have to have been made between November 11, 1965 and November 11, 1966. While it can be inferred from the opinion of the District Court that the complaints about the squeaky floor made by the Wayrynens to the Links in October 1966 constituted a claim within the policy period, Continental has continually asserted that no claim was made within the policy period.

If the policy is considered an "occurrence" policy, that is one in which the act or omission must occur during the policy period for there to be coverage, **Samuel N. Zarpas, Inc. v. Morrow, supra,** then had the act or omssion occurred during the policy period, it certainly would have been a violation of Montana policy (as set forth in R.C.M. §13-806) to limit the time within which a party may enforce his rights. See **Thielbar Realities, Inc. v. National Union Fire In-**

surance Co., 91 Mont. 525, 9 P.2d 469 (1932). Therefore, if the policy is considered to be an "occurrence" policy, the District Court finding that Link misled Continental into denying coverage would have no effect on policy coverage. The "if claim" clause as interpreted by Continental would in effect have required the filing of a complaint on or before November 11, 1966, the date the policy ended, in order for the Links to be covered. Such a requirement, we repeat, would be void as against public policy. **Theilbar Realities, Inc. v. National Union Fire Insurance Co., supra.** Thus, Link should have been entitled to coverage even if a complaint against the insured was not filed until June, 1967. The insurer, Continental, would not have been entitled to disclaim coverage even though Link misled the insurer into believing that the first information about a claim was received in May 1967 since assertion of coverage under R.C.M. §13-806 could have been made at least through June 1967. Presuming the act or omission to have occurred during the policy period, the insurer would not be permitted under Montana statute to limit the time within which the insured could assert a claim against the insurer.

If the policy is considered to be a "discovery" policy, the nature of the information required to secure coverage is far from clear. Appellee Continental suggests that the information required to constitute a "claim" for errors or omissions reaches the level of a demand for something on the ground of a right. Ap-

pellants Link and Wayrynen contend that the Wayrynen's complaints to Link during October 1966 about squeaky floors was sufficient information to entitle Link to coverage under the policy. This is asserted even though a determination that the squeaks were due to the Links' negligence was not made until after the policy period had ended. The logic of the appellee is not compelling. On the one hand, appellee argues that making a claim is a condition precedent to the right of coverage, and then on the other hand, they say the right of coverage must exist before claim can be made. It being far from clear what constitutes information of a claim under the policy, the misleading nature of Link's statement to Continental that the first he knew of complaints regarding the squeaky floor can be attributed directly to the ambiguous nature of the Continental policy.

A close examination of the contentions of each of the parties in this case suggests that even the appellee-insurer was uncertain whether its policy was of the nature of a "discovery" policy or of an "occurrence" policy. The insurer will not be permitted under these circumstances to claim the legal benefits of one type policy while denying the detrimental consequences of the same type policy. Specifically, Continental cannot claim that the policy requires occurrence of an act or omission within the policy period for there to be coverage, and then deny that the policy is an "occurrence" policy to which R.C.M. §13-806 is in applicable. Likewise, Continental cannot claim that the policy re-

quires discovery of an error or omission within the policy period and then deny that coverage exists even though information given during the policy period ultimately leads to a determination of liability against its insured.

We note, in conclusion, that we need not decide whether this is an "occurrence" or a "discovery" policy. If it is an "occurrence" policy, the insured would be entitled to coverage since suit was filed within the requirements of R.C.M. §13-806. If it is a "discovery" policy, the insured would be entitled to coverage since the ambiguity of the "if claim" provision is to be construed against the insurer.

ARE THE RIGHTS OF THE INJURED PARTY, THE WAYRYNENS, COEXTENSIVE WITH THE RIGHTS OF THE INSURED PARTY, THE LINKS?

Even if it were assumed to be correct that the Links were estopped to assert that coverage existed under this policy because J. G. Link had misled Continental into believing that no claim was made during the policy period under the circumstances of this case, such a determination should in no way be binding on the Wayrynens.

Appellants properly contend, in our opinion, that, under Montana law, the misrepresentation of the insured under an insurance policy does not affect the rights under the policy of an injured party. **McLane v. Farmers Insurance Exchange**, 150 Mont. 116, 432

P.2d 98 (1967). Thus, we agree with appellants' assertion that even though J. G. Link may have misled Continental into denying coverage under the instant policy, the Wayrynens may nevertheless recover from Continental for Links' negligence. We, therefore, do not agree with appellees' argument that under the policy, the Wayrynens have no rights greater than the Links, **Fireman's Fund Indemnity Co. v. Kennedy**, 97 F.2d 882 (9th Cir. 1938), nor do we agree with appellees' view that since the Wayrynens and Links in their motion to consolidate took the position that their rights were coextensive, they can not now claim rights that are separate and distinct.

First, the law is clear that an act of consolidation does not affect any of the substantive rights of the parties. 5 J. Moore's Federal Practice §42.02 (2d ed. 1971). Here, the Wayrynens initiated a separate suit and put on separate proof after consolidation. Thus, we are convinced, despite the recitals in the memorandum in support of the motion to consolidate, that if the appellants otherwise have separate and distinct rights, these rights have been preserved.

We are convinced, secondly, that under the policy provisions here presented, the Wayrynens had vested rights under the policy and were therefore entitled to assert coverage despite any estoppel of the Links.

There is no question that the general rule is that the rights of an injured party to proceed against the insurer is dependent upon the terms of the insurance contract and that the injured acquires no greater

rights under a policy than those existing in favor of the insured. **Fireman's Fund Indemnity Co. v. Kennedy, supra.** While some cases seem to have given an injured party greater rights than those possessed by an insured, 8 J. Appleman, Insurance Law & Practice §4811 (1962), in this case the Wayrynens had rights vested under the terms of the policy which entitled them to coverage even though the Links were estopped to assert coverage.

The Links' policy with Continental included the condition that:

> No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial, arbitration or by written agreement of the insured, the claimant and the Company.
>
> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the insured to determine the insured's liability.

A similar provision in an automobile liability policy

has been held to entitle the injured party, who complied with all the conditions of the policy despite the insured's failure to do so, to maintain a proceeding under the policy. **Northwest Mutual Insurance Co. v. Independence Mutual Insurance Co.**, 319 S.W. 2d 898, 903 (1959). See also **American Indemnity Co. v. Martin,** 54 S.W. 2d 542 (1932). Under **McLane v. Farmers Insurance Exchange, supra,** the Supreme Court of Montana has found that where the rights of an injured party vested prior to an attempted rescission of an automobile liability policy based on a misrepresentation by the insured, the injured party was entitled to coverage despite a default judgment having been entered against the insured. It is clear in the instant case that, since by the terms of the insurance contract an action could be maintained by a party obtaining a judgment against the insured if the insured "fully complied with all the terms of the policy," the Wayrynens have the right to attempt to prove that the Links were entitled to coverage. Indeed, the appellee specifically agrees with this proposition.*

The conditions of the policy which may have been broken by the Links were the cooperation clause and the notice provision. Since is was ordered by the District Court that the reference to Links' breach of the cooperation be deleted from the original findings of fact and conclusions of law, it is taken that this has been considered and that there is no issue concerning a breach of that clause. Also, the conclusion of the

* See Brief of Appellee at 29.

District Court that the Links breached the notice provision of the policy in that they did not give notice as soon as practicable after receiving information as to their errors is clearly erroneous.

The basis of the District Court's conclusion on notice is unclear. It appears to be based on a period either from October 1966, when Link was first told of the squeaking floor, to June 1967, when the Links gave the first written notice to Continental after having been served with a complaint based on the state court action, or from May 1967 when Link attended the meeting about the squeaking floors, to June 1967. If the period of concern is October 1966 to June 1967, the conclusion is erroneous since information received which is trivial in nature should not be used as the basis for requiring notice. See generally 8 J. Appleman, Insurance Law & Practice §§4742-44 (1962); 2 R. Long, Law of Liability Insurance §13.11 (1972). If the period of concern is May 1967 to June 1967, we hold under the circumstances of this case the delay in giving notice is not unreasonable. No prejudice was shown against Continental based on this delay in notice. Continental had ample time to prepare a defense and it had ample notice of suit, having been informed of the complaint within days after service upon its insured. In addition to the foregoing, the Wayrynens stood ready and willing to assist Continental in obtaining information relevant to the suit long before Continental made its final disclaimer. Thus, under

the unique circumstances of this case, we hold that the rights of the injured party are not coextensive with the rights of the insured insofar as the injured has been denied the right to assert that coverage be extended to him.

We find it unnecessary to consider the other contentions presented by the parties.

For the aforementioned reasons, the District Court is reversed and judgment in favor of both plaintiffs should be entered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and Elmer F. Link,

Plaintiffs-Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant-Appellee.

No. 26,220

WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Plaintiffs-Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant-Appellee.

APPEAL from the United States District Court for the District of Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District

Court for the District of Montana and was duly submitted.

ON CONSIDERATION WHEREOF,It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and judgment in favor of both plaintiffs should be entered. With costs in this Court in favor of the Appellants and against the Appellee in the amount of $972.50.

Costs:

Printing of Appellants' opening brief	$490.50
Printing of Appellants' reply brief	425.00
Preparation of the record	22.00
Docket fee	25.00
Clerk's fee	10.00
	$972.50

Filed and entered: December 15, 1972

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and Elmer F. Link,

Plaintiffs-Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant-Appellee.

No. 26,220

WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Plaintiffs-Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant-Appellee.

ORDER

Before: HAMLEY and HUFSTEDLER, Circuit Judges and MUECKE, District Judge*

*The Honorable C. A. MUECKE, United States District Judge for the District of Arizona, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for a panel rehearing.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: March 12, 1973

/s/ Frederick G. Hamley

/s/ Shirley Hufstedler

United States Circuit Judges

/s/ C. A. Muecke

United States District Judge

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Supreme Court, U. S.
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In the Supreme Court

of the

United States

October Term 1972

No. 72-1643

CONTINENTAL CASUALTY COMPANY,
an Illinois Corporation,

Petitioner,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

Brief of Respondent J. G. Link & Company Opposing Petition for Writ of Certiorari

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Respondents.

Brief of Respondent J. G. Link & Company Opposing Petition for Writ of Certiorari

The Respondent, J. G. Link & Company, a co-partnership of J. G. Link and Elmer F. Link, respectfully submits this brief opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit:

ARGUMENT

1. *The decision of the Court of Appeals is clearly correct.*

The Court of Appeals had no choice but to rule as it did in view of the policy provisions that Continental had inserted in the insurance contract which Continental had issued to J. J. Link & Company.

Professional liability policies issued by insurance companies for civil engineers, surveyors, architects, and the like, generally follow one of two forms. The district court in *Samuel N. Zarpas, Inc., vs. Daniel J. Morrow*, 215 F.Supp. 887 (1963) stated the situation best when it said:

> "John J McCassin, an expert in insurance matters, testified that there are two types of Errors and Omissions Policies: the 'discovery' policy and the 'occurrence' policy. In a discovery policy the coverage is effective if a negligent or omitted act is discovered and brought to the attention of the insurance company during the period of the policy, no matter when the act occurred. In an occurrence policy the coverage is effective if a negligent or omitted act occurred during the period of the policy, whatever the date of discovery."

Having in mind that statement from *Zarpas*, which quite correctly sets forth the kinds of policies issued in this field of liability coverage, let us examine the language of the Continental policy. It provides:

> "IV. Policy Period, Territory
>
> (a) During the Policy Period
>
> The insurance afforded by this policy ap-

> plies to errors, omissions or negligent acts which occur within the United States of America, its territories or possessions, or Canada (1) *during this policy period* if claim therefor is first made against the insured (2) *during this policy period.*" (Emphasis and numbers supplied.)

Because of the foregoing provision, the Continental policy was neither a "discovery" contract, nor an "occurrence" contract. It was a hybrid -- an attempted combination of both.

The Court of Appeals, with this kind of language in the policy before it, was led inescapably to this conclusion:

> "A close examination of the contentions of each of the parties in this case suggests that even the appellee-insurer was uncertain whether his policy was of the nature of a "discovery" policy or of an "occurrence" policy. The insurer will not be permitted under these circumstances to claim the legal benefits of one type of policy, while denying the detrimental consequences of the same type of policy. Specifically, Continental cannot claim that the policy requires occurrence of an act or omission within the policy period for there to be coverage, and then deny that the policy is an "occurrence" policy to which R.C.M. Section 13-806 is inapplicable. Likewise Continental cannot claim that the policy requires discovery of an error or omission within the policy period and then deny that coverage exists even though information given during the policy period ultimately leads to a determination of liability against its insured."
>
> "We note in conclusion, that we need not decide whether this is an 'occurrence' policy or a 'discovery' policy. If it is an 'occurrence' policy, the insured would be entitled to coverage since suit was

> filed within the requirements of R.C.M. Section 13-806. If it is a 'discovery' policy the insured would be entitled to coverage since the ambiguity of the 'if' claim provision is to be construed against the insurer." 470 F.2d 1137, 1138.

The fact that Continental's policy was a hybrid, not capable fo being categorized as either a "discovery" or an "occurrence" policy, renders nugatory any argument by Continental that the result in the Court of Appeals should have been different.

For example, Continental makes the claim in its petition for writ of certiorari, that the decision of the Court of Appeals herein is inconsistent with a decision of the same court a few months earlier in *Cornell, Holland, Hayes & Merryfield, Inc., vs. Continental Casualty Company* (C.A.9, 1972) 465 F.2d 22. However, the precise question of the hybrid provision was not raised in that case.

Nor is the decision conflicting with any decision of the Montana Supreme Court, including those cited by petitioner, because the same precise question has not been decided by the Montana Supreme Court.

Petitioner's further claim, that the district court should have admitted "expert" testimony to show what the local, technical, or peculiar signification of the terms used meant in the industry, is of no avail because that hybrid provision is obviously unclear, and no amount of "expert" testimony can cure that defect. In other words, the district court, the Court of Appeals, and this

Court is in as good position as any "expert" to determine that the hybrid provision is an incompatible combination of terms, as far as Continental is concerned.

Thus, petitioner is not entitled to relief under part A of its brief (Petitioner's brief, pp. 10-14, inclusive.)

2. *Breach of Cooperation was not an Issue is this Case.*

Part B of petitioner's brief (pp. 14116) seeks to fault the Court of Appeals because it did not consider any issue of breach of cooperation by the insured under the insurance policy.

This purported ground for petition is invalid because there never was an issue of breach of cooperation in the case. Such an issue was not pleaded by Continental, and its own claims manager, Mr. Worthington, testified:

> "Q. The reason for denial of coverage was because he wasn't cooperating, in your mind?
>
> A. (Mr. Worthington) Well, I suppose we could deny it on that basis, but that wasn't our purpose. We didn't want to deny it on the basis of non-cooperation. If we were going to deny it, we wanted it to be on the merits of the case."
>
> (Trial transcript, p. 269.)

Because breach of cooperation was not an issue before the district court, it struck from its conclusions any purported breach of cooperation. The reason for the district court so doing is obvious. The Court of Appeals therefore correctly concluded that there was no

issue in the case concerning the breach of cooperation clause (470 F.2d 1139).

Surely the Court of Appeals is not at fault for not considering a matter that was not in issue in the case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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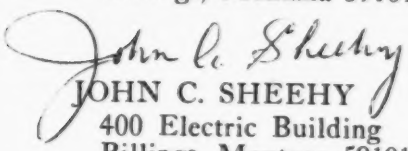

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Supreme Court, U. S.
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IN THE SUPREME COURT

of the

UNITED STATES

October Term 1972

No. 72-1643

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Petitioners,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondents Wayrynen Opposing Petition for Writ of Certiorari

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IN THE SUPREME COURT

of the

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Respondents.

Brief of Respondents Wayrynen Opposing Petition for Writ of Certiorari

Opinion

The findings of fact and conclusions of law are set forth in Appendix "A" of the Petition. The order of the District Court ruling on post-trial motions is set forth in Appendix "A" of this Brief. The opinion of the Court of Appeals (Appendix "B" of the Petition) reversing the judgment of the District Court is reported at 470 F. (2d) 1133 (9th Cir. 1972).

Jurisdiction

The judgment of the Court of Appeals (Appendix "C" of the Petition) was dated and entered December 15, 1972. Timely petition for rehearing was filed, and subsequently denied on March 12, 1973, (Appendix "D" of the Petition). This Court can assume jurisdiction by virtue of 28 U.S.C. §1254(1).

Questions Presented By Petitioner For Review

1. If, in the trial of an action without a jury, a District Court does not apply state rules of contract interpretation and also excludes evidence offered by an insurer which would be material and admissible in aid of insurance contract interpretation under state rules of evidence if the insurance contract is ambiguous, but, nevertheless, enters judgment in favor of the insurer on other grounds, may a Court of Appeals which reverses the District Court judgment, because it considers the insurance contract ambiguous, direct entry of judgment against the insurer without remanding to the District Court for further proceedings in which the state rules of contract interpretation are applied and the excluded evidence admitted and considered?

2. Whether a Court of Appeals may reverse a District Court judgment and direct entry of judgment for the appellant, when the Court of Appeals concedes that a contention advanced by the appellee has possible merit as grounds for affirming the District

Court judgment which was entered on other grounds, by assuming that the District Court determined that no issue existed on such contention?

Statutes Involved

§13-806, Revised Codes of Montana: *Restraints upon legal proceedings.* "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

(Volume 2, p. 94)

§58-211, Revised Codes of Montana: *Impossible or unlawful conditions void.* "A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the chapter on the object of contracts, or which is repugnant to the nature of the interest created by the contract, is void."

(Volume 4, p. 24)

Statement of the Case

This is a case involving the question of whether or not there was insurance coverage under an architects' errors and omissions policy issued by the Petitioner, CONTINENTAL CASUALTY COMPANY, (Continental). Respondents RAY WAYRYNEN, MRS. RAY WAYRYNEN, and WAYRYNEN FUNERAL HOME, INC. (Wayrynen) brought suit against Respondents J. G. LINK & COMPANY,

et al, (Link) in State District Court in Montana, alleging damages resulting from errors and omissions. Respondents Link had a policy with Petitioner, but Petitioner refused to defend the State Court action or to provide coverage under the policy upon the ground that no claim had been made within the policy period as required by the terms of the policies.

The Links brought a third party action against Continental in State Court, and Continental removed a portion of the action which related to insurance coverage to Federal District Court. Respondents Wayrynen recovered a judgment against the Respondents Link in the State Court and then brought suit on the judgment against Continental in the Federal Court. The two Federal Court actions were consolidated for trial.

In the Federal District Court, the Wayrynens and Links, as Plaintiffs, alleged, among other things, that the provisions of the policy which provided that both the negligence of the architect and the claim by the injured party had to occur within the one year policy period for there to be coverage was void as contrary to Montana law. The District Court, while it found the facts to be generally as contended by the Plaintiffs, found in favor of the Petitioner, Continental, citing the legal defenses of lack of notice, estoppel and lack of cooperation as the reasons.

Within the time provided by the Federal Rules of Civil Procedure the Wayrynens and the Links then moved the District Court to amend the findings, to

make new findings and to enter a new judgment in their favor. The motion was thoroughly briefed by all parties, and then the District Judge issued an order which recognized that his findings were in error with respect to cooperation and held that cooperation between insurer and insured as required by the policy in question was not an issue in the case but affirmed his earlier decision upon the ground that proper notice had not been given.

On appeal by these Respondents to the Circuit Court, the Court of Appeals for the Ninth Circuit reversed the District Court and entered its judgment for the Respondents. There was no cross appeal by the Petitioner with respect to the Court's ruling on cooperation.

The Court of Appeals unanimously held that the policy provision which required both negligence by the architect and a claim by the party injured thereby to occur within the policy period violated specific Montana statutes and cases. The Court of Appeals further held that the District Court was in error in holding that Continental's other legal defenses were valid. Continental then petitioned the Court of Appeals for rehearing and suggested the appropriateness of a rehearing in banc. Both the petition for rehearing and the suggestion for in banc review were rejected by the Circuit Court.

ARGUMENT

The Interpretation of the "If Claim Clause" By the Court of Appeals Was as a Matter of Law

The basic contention of the Petition raised under Question "1." of the questions presented for review relates to the so-called "if claim clause" of the policy which provides as follows:

> "IV. Policy Period, Territory
>
> (a) During the Policy Period
>
> The insurance afforded by this policy *applies to errors, omissions or negligent acts which occur* within the United States of America, its territories or possessions, or Canada *during this policy period if claim therefor* is first made against the insured *during this policy period.*" (Emphasis supplied.) [1]

The Petitioner is contending that since the Court of Appeals held that this provision was ambiguous, it should have remanded the case to the District Court for further evidence to resolve the ambiguity. The Petitioner claims that it offered such evidence at the trial of the case in the District Court and that it was improperly rejected.

However, the Circuit Court not only held that the provision of the policy quoted above was ambiguous, but it also held that if the interpretation sought by Continental were the correct interpretation, then the provision violated the public policy of the State of Montana and was void and unenforcible. The Court of Appeals summarized its conclusion by stating:

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[1] Appendix of Petition, pg. A-6.

> "An insurance company will not be permitted to deny liability under a policy that is so vague that no matter what the circumstances, the company may deny that coverage exists.
>
> This is such a situation." [2]

The Court of Appeals then goes on to consider all of the interpretations of the policy urged by the parties, holding that it need not decide which interpretation is correct, since under the statutes and case law of Montana, coverage is provided in any event. [3]

Thus, a remand of the case to receive evidence in support of Petitioner's interpretation of the policy provision would be a useless act, since even assuming it were correct, there would still be coverage. Even if this policy provision were clear and provided what the Petitioner contends it provides, the Court of Appeals was correct in holding it invalid. [4]

It should be noted that the Petitioner offered no evidence to the District Court which would suggest a "meeting of the minds" between the Links and Continental as to the meaning of the "if claim clause" at the time the policy was issued. Rather, the evidence which the Petitioner sought to introduce was evidence of consultations between the American Institute of Architects and Continental. [5]

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[2] Appendix "B" of Petition, pg. B-8.

[3] Appendix "B" of Petition, pgs. B-6 through B-11.

[4] See §13-806 R.C.M.; §58-211 R.C.M.; *Weissman & Sons* v. *St. Paul Ins. Co.*, 52 Mont. 291, 449 P. (2d) 740, 744 (Mont. 1969).

[5] Trial Transcript, pg. 5.

Yet, during the trial of the action, counsel for Continental established that neither of the insureds was or ever had been a member of the American Institute of Architects.[6] Thus, the evidence was neither material nor competent with respect to the issues before the Court and was properly excluded at the time of trial. Even if it were proper evidence to establish Petitioner's interpretation of the contract, that fact would not aid the Petitioner under the ruling of the Court of Appeals.

Since the contention here was presented to the Court of Appeals on petition for rehearing, we have a situation where the admissibility of this evidence, which is clearly a narrow question of State law, was rejected by both courts which considered it. It is submitted that the question of the admissibility of this evidence is not a proper question for review by this Court.

The Procedure of the Court of Appeals Was Proper

Another contention which is made by the Petitioner which, apparently, relates to the issue set forth in Question "1." is that it was improper for the Court of Appeals to enter judgment for the Plaintiffs. In support of this position, the Petitioner cites a number of cases involving jury trials, which hold that where a Defendant has not made a motion for judgment N.O.V. under rule 50 (b) of the Federal Rules of

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[6] Trial Transcript, pgs. 294 and 303.

Civil Procedure, it is improper for the Court of Appeals to reverse with directions to enter judgment for the Defendant, where the basis for the decision was that there was not sufficient evidence to go to a jury. [7] See e.g.:

Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1946).

The rationale of these cases is that had the trial judge been given an opportunity to rule on the motion for judgment N.O.V., the Plaintiff, under certain circumstances, would have the opportunity to dismiss without prejudice and refile unless the Defendant would suffer some legal prejudice from this procedure. [8] Since the decision as to whether or not the Plaintiff should have a new trial involves an exercise of discretion, this Court indicated that the trial judge, because of his familiarity with the case, would be in the best position to exercise this discretion. [9]

However, that rule has no application to the instant case. This case was decided by a District Judge, who solicited proposed findings of fact and conclusions of law. After the decision of the Court, these Respon-

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[7] Another reason for invoking this rule has been where the Court of Appeals has reversed, making a factual finding which the losing party has not had an opportunity to meet. See, e.g., *Fountain* v. *Filson*, 336 U.S. 681 (1949). In this case, the factual findings were all made by the District Court and no new factual findings were made by the Court of Appeals.

[8] *Cone*, supra, at pg. 217.

[9] *Id.*, at pg. 216.

dents filed extensive motions to have the Court amend its findings or to order a new trial or to direct the entry of a new judgment in accordance with their proposed findings. [10] This motion was extensively briefed and argued, and all of the contentions and arguments which were later made to the Court of Appeals were made to the District Court. Since these contentions were later considered and ruled upon by the Court of Appeals, there would be no point in remanding the case to the District Court, since there would be nothing to decide.

In this respect, it should be noted that in its decision, the Court of Appeals relied upon the factual findings of the District Court. In his findings, the District Court Judge found facts which indicated that the conditions precedent to coverage by the policy existed, [11] but that Continenal had certain legal defenses which were valid. The decision of the Court of Appeals struck down the defenses, leaving the factual findings of the District Court intact and concluded therefrom that there was coverage. It, therefore, entered judgment to that effect.

This Court has held that even in a jury case, where there has been a proper motion for a judgment N.O.V. under Rule 50(b), the Court of Appeals may

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[10] These motions resulted in the order contained in Appendix "A" to this Brief.

[11] See Findings of Fact, numbered V, VIII, IX, XIV, XVI, XVII, and XVIII. Said findings are set forth in Appendix "A" to the Petition.

remand and direct a verdict for the proper party. [12] Certainly, where, as here, the District Court has made extensive factual findings which support the conclusion of the Court of Appeals and had an opportunity to review its decision at the time of extensive post-trial motions, the action of the Court of Appeals in entering a judgment consistent with those facts was proper.

There Is No Conflict in Decisions With Respect to Construction of this Policy

Another contention made by the Petitioner which apparently relates to the first question is that the decision of the Court of Appeals in this case conflicts with its decision in *Cornell, Howland, Hayes & M, Inc.* v. *Continental Casualty*, 465 F. (2d) 22 (1972). While a reading of the latter case shows that it did not reach the issues which were determinative in this case, it should also be noted that the Court in *Cornell*, supra, was interpreting the law of Oregon, [13] while in this case, it is clear that the Court was relying on particular Montana code sections and decisions in reaching its conclusion. There is no suggestion in the *Cornell* case that similar statutes or decisions exist in Oregon. There is no conflict between these cases.

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[12] *Neely* v. *Evy Construction Co.*, 386 U.S. 317 (1967).
[13] *Cornell*, supra, at pg. 25.

The Court of Appeals Was Correct In Ruling that Cooperation Was Not an Issue

The contention of the Petitioner which relates to the second question presented for review is that since the Court of Appeals "concedes that a contention advanced by the Appellee has possible merit *as grounds for affirming the District Court*", it was in error in assuming that the contention was not an issue. The Appellee then argues that cooperation was proper basis for affirming the District Court.

However, the opinion of the Court of Appeals nowhere indicates that the cooperation issue had "possible merit as grounds for affirming the District Court." Rather, it stated that cooperation was a *contract* provision which *may* have been breached.[14] However, the Court then went on to hold that it was not a ground for affirming the District Court, since it was not an issue in the case, and had been held not to be an issue in the case by the District Court.[15]

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[14] Opinion of the Court of Appeals set forth in Appendix "B" of the Petition at page B-14.

[15] *Id.* Further, it should be noted that one of the principle holdings of the decision of the Court of Appeals was that anything the Links did or didn't do on the 6th of October, 1967 (the date of the alleged breach of the cooperation clause) would not be binding on the Wayrynens. Therefore, even if the Court were to find merit in the contention of the Petition in this respect, the judgment in favor of the Wayrynens would not be disturbed.

Both the District Court and the Court of Appeals were correct in this respect. Cooperation is an affirmative defense which must be pleaded and proved. [16]

Here, it was not pleaded, and there was no direct evidence offered by the Petitioner to prove a breach of the cooperation clause. [17] Rule 9 (c) of the Federal Rules of Civil Procedure provides: [18]

> "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. *A denial of performance or occurrence shall be made specifically and with particularity.*" (Emphasis supplied.)

Since Continental did not plead lack of cooperation, both Montana and Federal cases indicate that this is tantamount to an admission that it is not an issue,

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[16] See citations infra at Footnote 19.

[17] There is some evidence in the record which would tend to support the contention that the cooperation clause was breached. However, the direct evidence, such as that of Mr. Worthington's set forth infra, does not support the Petitioner's contention.

[18] Rule 9 (c) of the Montana Rules of Civil Procedure is identical.

and that it may not be used to support a judgment upon appeal. [19]

Further, it is clear that a defense may be waived. [20] The record here clearly shows that Continental waived the defense of cooperation at the trial level. As indicated, there was no pleading with respect to cooperation. Further, during the trial, Mr. Worthington, the claims manager for Continental who had denied coverage, testified on cross examination as follows:

> "Q. The reason for denial of coverage was because he wasn't cooperating, in your mind?
>
> A. (Mr. Worthington) Well, I suppose we could deny on that basis, but that wasn't our purpose. *We didn't want to deny it on the basis of non-cooperation.* If we were going to deny it, we wanted it to be on the merits of the case." (Emphasis supplied.) [21]

Further, during the course of the trial, the Respondents Wayrynen objected to a question upon the grounds that cooperation was not an issue in the

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[19] *Tahalferty* v. *Wilmering*, 112 U.S. 713 (1884); *Ginsburg* v. *Ins. Co. of North America*, 427 F. (2d) 1318 (6th Cir. 1970); *Lumbermen's Mutual Ins. Co.* v. *Bowman*, 313 F. (2d) 381 (10th Cir. 1963); *Treasure State Industries* v. *Leland, et at*, 151 Mont. 280, 443 P. (2d) 22 (Mont. 1968). (The Montana law is cited in the event that this rule might be considered substantive, rather than procedural.)

[20] *Penhallow* v. *Doane's Administrators*, 3 Dallas 54 at 95 (1795).

[21] Trial Transcript, pg. 269.

case. After a discussion with counsel, the Court ruled:

> "It hasn't been raised. *Continental has just said no, we are not concerned about lack of cooperation. The witness on the stand, Mr. Worthington, said no, we are not concerned with that. There's no question of lack of cooperation in the case, sofar as I understand, either by way of pleadings or evidence.*" (Emphasis supplied.) [22]

There was *no objection* to this ruling by Continental.

Thus, the holding of the Court of Appeals was correct in that it indicated that while there may have been a possible breach of the cooperation provision, it was not an issue in the case (and hence, not a ground for upholding the opinion of the District Court). The Petitioner bases part of its argument upon the fact that the District Court made a conclusion in support of its decision on estoppel, which might also be construed as relating to cooperation. [23] However, at the time of its order with respect to the post-trial motions, the District Court recognized that any reference to cooperation in its original findings and conclusions was incorrect and specifically ruled:

"The Court is also cognizant of the fact that

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[22] Trial Transcript, pgs. 279 and 280. The record in this respect has been reproduced in Appendix "B" to this Brief.

[23] See Conclusions IX and X of the District Court which are set forth in Appendix "A" to the Petition at pages A-25 and A-26.

> it ruled at the trial that cooperation of the insured was not an issue of this case, through pleadings or otherwise. Consequently, the conclusions of law have been amended to reflect the same." [24]

This ruling of the District Court was subsequent to the judgment of the District Court and the Petitioner here did not cross appeal to have the Court of Appeals overrule this holding. [25]

The position of the Petitioner with respect to the second question presented for review is based upon the rule that the Appellee may urge any argument in support of the judgment of the lower court. However, the Petitioner overlooks the provision of the rule which requires that the argument urged by

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[24] The complete order of the District Court is set forth in Appendix "A" to this Brief.

[25] There is some question as to whether a cross appeal would be required in this case. However, it appears that the Petitioner is seeking to supplement the Decree of the District Court with a matter which was not in the record, and, therefore, a cross appeal would be required by the rule stated in *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1936) at pg. 191. See also, *Alaska Industrial Board* v. *Chugach Electric Association*, 356 U.S. 320 (1958) at pg. 325.

the Appellee *must be supported by the record.*[26] Breach of cooperation as a *defense* (and thus, a basis for supporting the District Court) is not supported by the record in this case, and the Court of Appeals was correct in its holding.

CONCLUSION

This case is one which deals with specific questions of Montana law which were correctly decided by the Court of Appeals. The Court of Appeals correctly considered the issue of cooperation, and there was no procedural error in not remanding the case to the District Court.

The petition for Certiorari does not establish any substantial or meritorious reason why, under Rule 19 of the Rules of this Court, certiorari should be granted. The issues decided in the District Court and Court of Appeals do not go beyond the interests of the

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[26] The most recent case stating this rule, cited by the Petitioner is *Dandridge* v. *Williams*, 397 U.S. 471 (1970) at pg. 475. The court in *Dandridge* set forth the rule quoting *United States v. American Ry. Exp. Co.*, 265 U.S. 425 at 435:

> "'It is likewise settled that the Appellee may, without taking a cross appeal, urge in support of a decree any matter *appearing in the record*, although his argument may involve an attack upon the reasoning of the lower court or an insistance upon a matter overlooked or ignored by it.'" (Emphasis supplied.)

parties in this particular litigation. It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

July 10, 1973

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Appendices

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

J. G. LINK & COMPANY, a Co-Partnership, of J. G. LINK and ELMER F. LINK,

Plaintiffs,

ORDER
No. 1574

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant.

WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Plaintiffs,
No. 1667

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant.

The plaintiffs have made various motions to the court: Consolidation Motions for New Trial, To Open Judgment and Take Additional Testimony, To Amend Findings of Fact and Conclusions of Law, To Make New Findings and Conclusions, To Direct the Entry of a New Judgment, and To Certify to the Supreme Court Of The State of Montana The Question of the Validity of the "If Claim" Clause of the Insurance Policy, and the court having taken each of the motions under advisement, and being fully advised in the premises,

THEREFORE, IT IS ORDERED and this does order that the motions For a New Trial, To Open Judgment and Take Additional Testimony, To Make New Findings and Conclusions, To Direct the Entry of a New Judgment and To Certify to The Supreme Court of the State of Montana The Question of the Validity of the "If Claim" Clause of the Insurance Policy, be and the same are hereby denied. The motion to Amend Findings of Fact and Conclusions of Law be and the same is hereby granted, and the sentence

> "the failure on October 6, 1967, to make the disclosure of information required is in violation of paragraph 3 of the conditions of the insurance policy and constitutes a breach thereof on the part of the Links"

is deleted from Paragraph X of the Conclusions of Law, while Paragraph XI is amended to read

> "The Links breached the terms and conditions of the insurance policy here involved as above described; . . ."

The court feels that the issue as to whether or not insurance coverage exists is primarily controlled by the insured's failure to give notice to Continental Casualty Company of a claim for errors and omissions made by Mr. and Mrs. Wayrynen. The policy required that the insured

> "shall, as soon as practicable after receiving information as to his alleged errors, omissions or negligent acts, give written notice thereof to the Company with full particulars of any claim arising therefrom . . .

This is a condition precedent to coverage and it was not proven by the plaintiffs.

The court is also cognizant of the fact that it ruled at trial that co-operation of the insured was not an issue of this case, through pleadings or otherwise. Consequently, the Conclusions of Law have been amended to reflect the same.

Done and dated this 30th day of April, 1970.

s/ W. D. Murray

W. D. Murray
Senior United States District Judge.

Appendix B

"Q: (BY MR. LYNCH): Mr. Overfelt, why were you reluctant to let representatives of Continental talk to Mr. Link?

MR. POORE: To which the Plaintiffs Wayrynen object upon on the grounds and for the reasons that Continental is estopped to raise any claim of lack of co-operation and has also waived any claim of lack of co-operation and the question of lack of co-operation is no issue in the case.

COURT: I don't think I understand the problem.

MR. BLEWETT: I don't understand the reason for the question myself.

COURT: —What difference does it make to anyone what his (Mr. Overfelt's) opinion was?

MR. LYNCH: Your Honor, this point was raised, the lack of co-operation—

COURT: —it hasn't been raised. Continental has just said no, we are not concerned about lack of co-operation. The

witness on the stand, Mr. Worthington, said no we weren't concerned with that. There's no question of lack of co-operation in the case, as far as I can understand, either by way of pleadings or evidence." (Trial Transcript 279-280)

RULES CITED

Page

Rule 15 (b), Federal Rules of Civil Procedure..... 2

MISCELLANEOUS AUTHORITIES

3 Moore's Federal Practice, § 15.13[2]..... 3

In the Supreme Court

of the

United States

October Term 1972

No. 72-1643

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Petitioner,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

PETITIONER'S REPLY BRIEF

ARGUMENT

The Respondents maintain in their Answer Brief that the Court of Appeals properly did not consider

the breach of cooperation defense because the defense was not pleaded. The Court of Appeals, however, did not so adjudge; merely, it refused to even consider or rule upon the issue presented.

The failure of J. G. Link to cooperate on October 6, 1967, as it developed during the course of trial, was and is a proper basis for sustaining the District Court judgment because this breach was introduced into evidence through evidence introduced by the Respondents (Tr., p. 194, l. 20 - p. 195, l. 5; p. 269, l. 5-14) and through evidence introduced without objection through examination of Petitioner's witnesses (Tr., p. 202, l. 24 - p. 204, l. 20; p. 208, l. 9 - p. 211, l. 12; p. 254, l. 1 - p. 255, l. 9).

The District Court's ruling at the trial (that cooperation of the insured was not at issue) was after evidence of the failure to cooperate on October 6, 1967, had already been introduced, and the ruling related only to pre-October 6, 1967, lack of cooperation (Tr., p. 279, l. 15 - p. 280, l. 20. Compare Tr., p. 269, l. 5 - l. 14).

Rule 15 (b), of the Federal Rules of Civil Procedure, provides that when issues not raised by the pleadings are tried by implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and the pleadings may be amended accordingly **even after judgment,** and "* * * failure so to amend does not affect the result of the trial of these issues." It is uniformally held by the various Courts of Appeals that this rule ap-

plies to affirmative defenses as well.[1] Consent to try affirmative defense issues not raised by the answer is implied by a plaintiff introducing evidence on the subject, or where evidence on the subject is introduced by the defendant without objection by the plaintiff.[2] Rule 15 (b) is not permissive in terms as it provides that issues tried by implied consent **shall** be treated as if raised in the pleadings.[3] Accordingly, under the circumstances of this case, it was not necessary to affirmatively plead the breach of the cooperation condition of the insurance policy.

Respectfully submitted,

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[1] 3 Moore's Federal Practice, § 15.13[2], page 987.
[2] Id, page 994.
[3] Id, page 996.